SEPARATION OF POWERS IN FLUX IN BOTH WISCONSIN AND WASHINGTON

Two legal scholars offer perspectives on court decisions and trends that are bringing momentous shifts in the allocation of governmental authority at both the state and federal levels.

The legal ground is shifting in the law of the separation of powers. Decisions by both the Supreme Court of the United States and the Wisconsin Supreme Court reflect and constitute important, even controversial, changes. The following pages present two sets of intelligent and accessible insights by distinguished professors into these legal developments.

The first is a question-and-answer session with Chad M. Oldfather, professor of law at Marquette University. The topic is his developing scholarship on separation of powers under the Wisconsin constitution, with particular emphasis on the approach of the Wisconsin Supreme Court. The touchstone is his new article, “Some Observations on Separation of Powers and the Wisconsin Constitution,” 105 Marq. L. Rev. 845 (2022).

The second is a recent series of guest posts on the Volokh Conspiracy blog by Thomas W. Merrill, the Charles Evans Hughes Professor of Law at Columbia University and a friend of Marquette Law School. The five-part series engages critically with the U.S. Supreme Court’s decision this past summer in West Virginia v. EPA, holding unlawful an innovative approach by the federal agency to addressing the question of climate change.

The reasons for our presenting the two sets of entries include, most generally, that developments in federal law (the subject of the Merrill entries) often have a pull on state law (Oldfather’s topic).

Considerably more specifically: Both Oldfather and Merrill identify and criticize recent judicial justifications for upsetting decisions made by the other branches. Oldfather’s research quite directly takes on separation-of-powers questions under the Wisconsin constitution. Merrill’s approach addresses the future of the Chevron doctrine involving judicial deference in the administrative-agency context and the question whether Congress may become subject to a revival of the nondelegation doctrine.

In short, this latest work of both professors, while likely to produce spirited rejoinders, certainly merits attention and consideration.